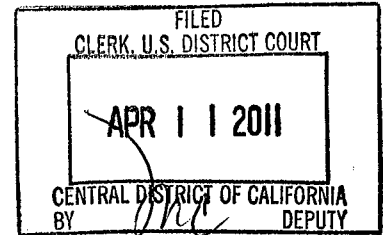


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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 SOUTHERN DIVISION

RIGOBERTO SALINAS,

Petitioner,

v.

MATTHEW CATE, Sec. of Corrections,

Respondent.

Case No. SACV 11-00211 PSG (AN)

**ORDER DISMISSING HABEAS
 PETITION AS TIME-BARRED**

Before the court is a Petition for Writ of Habeas Corpus (“Petition”) brought by Rigoberto Salinas (“Petitioner”), a state prisoner proceeding *pro se*. For the reasons discussed below, the Petition is dismissed with prejudice because the court finds it is time-barred.

I. BACKGROUND

The pending Petition, filed by the clerk on February 4, 2011, raises three claims directed at Petitioner’s conviction in the California Superior Court for Orange County (case no. 06NF3316) of carjacking with use of a firearm, unlawfully taking a vehicle, possession of a controlled substance, and possession of controlled substance paraphernalia, as well as his related sentence of 17 years, 4 months.

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1 Pursuant to the court's duty to screen § 2254 petitions, the Magistrate Judge
2 found it plainly appeared from the face of the Petition and relevant state court records
3 that this action was barred by the one-year statute of limitations of the Anti-Terrorism
4 and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. §2244(d)(1)(A).
5 Accordingly, on March 17, 2011, the Magistrate Judge issued an order to show cause
6 that notified Petitioner the action appeared to be time-barred absent some basis for
7 tolling or an alternative start to AEDPA's one-year limitations period under 28 U.S.C.
8 § 2244(d)(1)(B)-(D). (3/17/11 Order to Show Cause re Dismissal of Petition for Writ
9 of Habeas Corpus by a Person in State Custody as Time-barred ("OSC"), dkt. 8.) The
10 OSC discussed the various bases for tolling and directed Petitioner to show cause why
11 the action should not be dismissed as time-barred by filing a written response no later
12 than April 1, 2011. (OSC at 4-9.) Petitioner filed his response to the OSC
13 ("Response") on March 31, 2011 (dkt. 16), and the matter now stands submitted.

14 II. DISCUSSION

15 A. Standard of Review

16 Rule 4 of the Rules Governing Section 2254 Cases in the United States District
17 Courts, 28 U.S.C. foll. § 2254, requires a judge to "promptly examine" a habeas
18 petition and "[i]f it plainly appears from the petition and any attached exhibits that the
19 petitioner is not entitled to relief in the district court, the judge must dismiss the
20 petition and direct the clerk to notify the petitioner." Local Rule 72-3.2 of this court
21 also provides "[t]he Magistrate Judge promptly shall examine a petition for writ of
22 habeas corpus, and if it plainly appears from the face of the petition and any exhibits
23 annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may
24 prepare a proposed order for summary dismissal and submit it and a proposed
25 judgment to the District Judge." C.D. Cal. R. 72-3.2. Further, an untimely habeas
26 petition may be dismissed *sua sponte*, however, the district court must give the
27 petitioner adequate notice and an opportunity to respond before doing so. *Day v.*
28 *McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d

1 1039, 1043 (9th Cir. 2001).

2 **B. Statute of Limitations**

3 The Petition is governed by the AEDPA, which establishes a one-year statute
4 of limitations for state prisoners to file a habeas petition in federal court, because the
5 Petition was filed after April 24, 1996, AEDPA's enactment date. 28 U.S.C. §
6 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In
7 most cases, the limitations period begins to run from "the date on which the judgment
8 became final by conclusion of direct review or the expiration of the time for seeking
9 such review." 28 U.S.C. § 2244(d)(1)(A).

10 The face of the Petition, attached exhibits, and relevant state court records^{1/}
11 establish the following relevant facts. Petitioner was convicted of the above offenses
12 on June 27, 2007, and was sentenced on September 7, 2007. The California Court of
13 Appeal, Fourth Appellate District, Division Three, affirmed the judgment on direct
14 appeal on November 17, 2008 (case no. G039268). The California Supreme Court then
15 denied review of the court of appeal's decision on February 11, 2009 (case no.
16 S169452). (Pet. at 2-3^{2/}; state court records.) Petitioner does not appear to have filed
17 a petition for certiorari with the United States Supreme Court. Therefore, for purposes
18 of AEDPA's limitations period, Petitioner's judgment became final on May 12, 2009,
19 the ninetieth day after the state high court denied his petition for review and the last
20

21 ^{1/} The court takes judicial notice of Petitioner's records in the California
22 Superior Court for Orange County, available on the Internet at
23 <http://www.occourts.org>, and his records in the state appellate courts, available at
24 <http://appellatecases.courtinfo.ca.gov> ("state court records"). *See Smith v. Duncan*, 297
25 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of relevant state
court records in federal habeas proceedings).

26 ^{2/} Petitioner did not consecutively number the pages of the Petition and
27 attached exhibits as required by Local Rule 11-3.3. For sake of clarity, the court cites
28 the pages of the Petition by referring to the electronic pagination furnished by the
court's official CM-ECF electronic document filing system.

1 date for him to file a petition for certiorari with the Supreme Court. *Bowen v. Roe*, 188
2 F.3d 1157, 1159 (9th Cir. 1999). The statute of limitations then started to run the next
3 day, May 13, 2009, and ended a year later on May 12, 2010. 28 U.S.C. §
4 2244(d)(1)(A); *see also Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001)
5 (the limitations period begins to run on the day after the triggering event pursuant to
6 Fed. R. Civ. P. 6(a)). Petitioner did not constructively file his pending Petition until
7 January 28, 2011 -- 261 days (approximately nine months) after the expiration of the
8 limitations period.^{3/}

9 Accordingly, absent some basis for tolling or an alternative start date to the
10 limitations period under 28 U.S.C. § 2244(d)(1), the pending Petition is time-barred.

11 **C. Statutory Tolling**

12 AEDPA includes a statutory tolling provision that suspends the limitations
13 period for the time during which a “properly-filed” application for post-conviction or
14 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip v.*
15 *Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
16 Cir. 2005). An application is “pending” until it has achieved final resolution through
17 the state’s post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.
18 2134 (2002). The limitations period is not tolled between the time a final decision is
19 issued on direct state appeal and the time a state collateral challenge is filed because
20 there is no case “pending” during that interval. *Thorson v. Palmer*, 479 F.3d 643, 646
21 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). On collateral

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23 ^{3/} Pursuant to the “mailbox rule,” a *pro se* prisoner’s habeas petition is
24 deemed to be filed on the date the prisoner delivers the petition to prison authorities
25 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
26 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The pending Petition
27 was filed by the clerk on February 4, 2011. (Pet. at 1.) However, for purposes of the
28 timeliness analysis, the court gives Petitioner the benefit of the doubt by assuming he
constructively filed the Petition on January 28, 2011, the date the envelope containing
the Petition was postmarked. (Pet. at 46.)

1 review, however, “intervals between a lower court decision and a filing of a new
2 petition in a higher court,” when reasonable, fall “within the scope of the statutory
3 word ‘pending’” thus tolling the limitations period. *Saffold*, 536 U.S. at 221, 223; *see*
4 *also Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006).

5 Further, to qualify for statutory tolling during the time the petitioner is pursuing
6 collateral review in the state courts, his *first* state habeas petition must be
7 constructively filed *before*, not after, the expiration of AEDPA’s one-year limitations
8 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254
9 does not permit the reinitiation of the limitation period that has ended before the state
10 petition was filed”); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A
11 state-court petition [] that is filed following the expiration of the limitations period
12 cannot toll that period because there is no period remaining to be tolled”).

13 Here, the relevant state records establish Petitioner filed three state habeas
14 petitions, one in the state court of appeal (case no. G043675), and two in the
15 California Supreme Court (case nos. S183476 and S190288). (Pet. at 4, 29-36; state
16 court records.) The first of those three petitions was constructively filed in the court
17 of appeal on May 9, 2010,^{4/} three days before the expiration of the limitations period
18 on May 12, 2010. (See attachment to Petitioner’s declaration in compliance with the
19 court’s 3/2/11 Order (AN), dkt. 7.) That petition was denied a week later on May 27,
20 2010. Petitioner’s next petition was constructively filed in the California Supreme
21 Court (case no. S183476) on June 3, 2010, and denied on January 12, 2011. (Pet. at
22 29, 30, 36.) As a result, Petitioner is entitled to 248 days of statutory tolling (May 9,
23 2010-January 12, 2011) for the pendency of case nos. G043675 and S183476, which
24 includes the seven-day gap between them when no petition was pending. *Saffold*, 536
25 U.S. at 223; *Chavis*, 546 U.S. at 192-93. However, Petitioner constructively filed the
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27 ^{4/} *See Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003) (the
28 mailbox rule also applies to *pro se* state habeas petitions).

1 current Petition 261 days after the limitations period expired, so even given the
2 statutory tolling time to which he is entitled, his Petition is still untimely by 13 days.

3 Petitioner constructively filed an additional habeas petition in the California
4 Supreme Court (case no. S190288) on January 25, 2011, which is still pending. (Pet.
5 at 4, 8; Exhibit to the Response; state court records.) In his Response, Petitioner claims
6 he is entitled to tolling for the pendency of that petition. (Response at 1-2.) Petitioner
7 is mistaken. Contrary to his assertion, the court did address that petition in the OSC.
8 And, as the court explained in the OSC, Petitioner is not entitled to statutory tolling
9 for the pendency of that third state habeas petition because his second petition was
10 filed in the same court, and only “intervals between a lower court decision and a filing
11 of a new petition in a higher court” toll the limitations period. *See Saffold*, 536 U.S.
12 at 223.

13 Additionally, Petitioner’s prior federal habeas action (CV 10-19 PSG (AN)) has
14 no bearing on the court’s timeliness analysis.^{5/} By the AEDPA’s express terms, the
15 limitations period is only tolled during the pendency of “a properly filed application
16 for *State* post-conviction or other collateral review.” 28 U.S.C. § 2244(d)(2) (emphasis
17 added). Section 2244(d)(2) does not toll the limitations period while a *federal* habeas
18 petition is pending. *Duncan v. Walker*, 533 U.S. 167, 181-82, 121 S. Ct. 2120 (2001).
19 Further, the pending action cannot “relate back” to the prior action because that action
20 was dismissed in its entirety and is no longer pending. *Rasberry v. Garcia*, 448 F.3d
21 1150, 1155 (9th Cir. 2006) (“[T]he relation back doctrine does not apply where the
22 previous habeas petition was dismissed because there is nothing to which the new
23 petition could relate back.”); *see also Mayle v. Felix*, 545 U.S. 644, 662, 125 S. Ct.
24 2562 (2005) (“If claims asserted after the one-year period could be revived simply
25 because they relate to the same trial, conviction, or sentence as a timely filed claim,

26
27 ^{5/} A federal court may take judicial notice of its own records in other cases.
28 *United States v. Wilson*, 631 F.2d 118, 119 (9th Cir. 1980).

1 AEDPA's limitation period would have slim significance").

2 **D. Alternative Start of the Statute of Limitations**

3 **1. State-Created Impediment**

4 In rare instances, AEDPA provides that its one-year limitations period shall run
5 from "the date on which the impediment to filing an application created by State action
6 in violation of the Constitution or laws of the United States is removed, if the
7 applicant was prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B).
8 Asserting that the statute of limitations was delayed by a state-created impediment
9 requires establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th
10 Cir. 2002). Thus, a claim under this provision "must satisfy a far higher bar than that
11 for equitable tolling." *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir. 2009). Petitioner
12 has not demonstrated he is entitled to relief under this provision despite having an
13 opportunity to do so.

14 **2. Newly Recognized Constitutional Right**

15 AEDPA provides that, if a claim is based upon a constitutional right that is
16 newly recognized and applied retroactively to habeas cases by the United States
17 Supreme Court, the one-year limitations period begins to run on the date which the
18 new right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).
19 Petitioner has also not demonstrated he is entitled to relief under this provision despite
20 having an opportunity to do so.

21 **3. Discovery of Factual Predicate**

22 AEDPA also provides that, in certain cases, its one-year limitations period shall
23 run from "the date on which the factual predicate of the claim or claims presented
24 could have been discovered through the exercise of due diligence." 28 U.S.C. §
25 2244(d)(1)(D); *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). Petitioner has
26 not demonstrated he is entitled to an alternate start date to the limitations period based
27 upon the late discovery of the factual predicate despite having an opportunity to do so.

28 ///

1 **E. Equitable Tolling**

2 The AEDPA's limitations period "is subject to equitable tolling in appropriate
3 cases." *Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2560 (2010). However,
4 "[e]quitable tolling is justified in few cases" and "the threshold necessary to trigger
5 equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule."
6 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (quoting *Miranda v. Castro*, 292
7 F.3d 1063, 1066 (9th Cir. 2002)).

8 "[A] litigant seeking equitable tolling bears the burden of establishing two
9 elements: (1) that he has been pursuing his rights diligently, and (2) that some
10 extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408,
11 418, 125 S. Ct. 1807 (2005); *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079
12 (2007). *Pace*'s diligence prong requires the petitioner to show he engaged in
13 reasonably diligent efforts to file his § 2254 petition throughout the time the
14 limitations period was running. *Mendoza v. Carey*, 449 F.3d 1065, 1070 (9th Cir.
15 2006); see also *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (equitable tolling
16 requires a showing that "the party seeking equitable tolling must have acted with
17 reasonable diligence throughout the period he seeks to toll" and "extraordinary
18 circumstances prevented him from filing his petition on time"). The petitioner must
19 also demonstrate that he exercised reasonable diligence in attempting to file his habeas
20 petition after the extraordinary circumstances began otherwise the "link of causation
21 between the extraordinary circumstances and the failure to file [is] broken." *Spitsyn*,
22 345 F.3d at 802. *Pace*'s "extraordinary circumstances" prong requires the petitioner
23 to "additionally show that the extraordinary circumstances were the cause of his
24 untimeliness, and that the extraordinary circumstances made it impossible to file a
25 petition on time." *Ramirez*, 571 F.3d at 997 (internal quotations and citations omitted).
26 Further, equitable tolling determinations are "highly fact-dependent," *Mendoza*, 449
27 F.3d at 1068, and the petitioner "bears the burden of showing that equitable tolling is
28 appropriate." *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir. 2005).

1 Petitioner has not demonstrated he is entitled to equitable tolling despite having an
2 opportunity to do so.

3 Accordingly, the pending Petition is barred by the statute of limitations.

4 **ORDER**

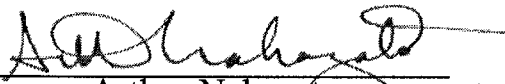
5 Based upon the foregoing, the court finds the Petition is time-barred. Further,
6 by way of the OSC, the court finds Petitioner has received notice and an adequate
7 opportunity to show cause why the Petition should not be dismissed as time-barred.
8 ACCORDINGLY, IT IS HEREBY ORDERED THAT the reference to the Magistrate
9 Judge is vacated and the Petition is dismissed with prejudice. The clerk is directed to
10 enter judgment dismissing this action with prejudice and notifying Petitioner of said
11 judgment. Any and all pending motions are terminated.

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13
14 DATED: April 08, 2011



15 PHILIP S. GUTIERREZ
16 UNITED STATES DISTRICT JUDGE

17 Presented by:

18
19 
20 Arthur Nakazato
21 United States Magistrate Judge